IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

MONDAY, THE 13TH AUGUST 2007 / 22ND SRAVANA 1929

WP(C).No. 3501 of 2005(P)

PETITIONERS:

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1. VARKEY, AGED 48 YEARS
   S/O. SRI.CHERIA, MANGALATHU HOUSE,
   KARIMATTOM KARA, ENANALLOOR VILLAGE,
   MUVATTUPUZHA TALUK.

2. MARY, AGED 45 YEARS
   W/O. SRI.VARKEY, MANGALATHU HOUSE,
   KARIMATTOM KARA, ENANALLOOR VILLAGE,
   MUVATTUPUZHA TALUK.

3. BENOY, AGED 21 YEARS
   S/O. VARKEY, MANGALATHU HOUSE, KARIMATTOM KARA,
   ENANALLOOR VILLAGE, MUVATTUPUZHA TALUK.

4. BIJU, AGED 20 YEARS
   S/O. VARKEY, MANGALATHU HOUSE, KARIMATTOM KARA,
   ENANALLOOR VILLAGE, MUVATTUPUZHA TALUK.

5. PAILY, AGED 45 YEARS
   S/O. SRI. CHERIA, MANGALATHU HOUSE,
   KARIMATTOM KARA, ENANALLOOR VILLAGE,
   MUVATTUPUZHA TALUK.

BY ADV. SRI.ANIL S.RAJ

RESPONDENTS:

1.PAULOSE S/O. SRI.THOMAS,
   MANGALATHU HOUSE, KARIMATTOM KARA,
   ENANALLOOR VILLAGE, MUVATTUPUZHA TALUK. (DIED)

***ADDL.R2 TO R7 IMPLEADED**

2. ELAMMA, AGED 65 YEARS, WIFE OF LATE PAULOSE,
   MANGALATH HOUSE, AAYAVANA P.O., MUVATTUPUZHA.

3. LEELA, AGED 37 YEARS, DAUGHTER OF LATE PAULOSE, DO.

4. THANKA, AGED 35 YEARS, WIFE OF JOHNY DO.

5. BABY, AGED 33 YEARS, SON OF LATE PAULOSE, DO.

6. SHAJI, AGED 30 YEARS, SON OF LATE PAULOSE, DO.

7. REJI, AGED 28 YEARS, SON OF LATE PAULOSE, DO.

*ADDL. R2 TO R7 ARE IMPLEADED AS PER THE ORDER DATED 12.7.2005 IN I.A.7761/05.

BY ADV. SRI.R.BINDU (SASTHAMANGALAM)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX(WPC 3501/05)

PETITIONERS' EXTS.:

EXT.P1: TRUE COPY OF THE PLAINT IN O.S.NO.64 OF 2004 ON THE FILES OF THE MUNSIFF'S COURT, MUVATTUPUZHA.

EXT.P2: TRUE COPY OF THE WRITTEN STATEMENT IN O.S.64/04.

EXT.P3: TRUE COPY OF THE COMMISSION REPORT DATED 25.2.2004.

EXT.P4: TRUE COPY OF THE COMMISSION REPORT DATED 4.6.2004.

EXT.P5: TRUE COPY OF ORDER DATED 12.11.2004 OF THE HON'BLE MUNSIFF'S COURT, MUVATTUPUZHA IN I.A.NO.1145 OF 2004 IN O.S.NO.64 OF 2004.

EXT.P6: TRUE COPY OF JUDGMENT DATED 15.1.2005 IN C.M.A.NO.14 OF 2004 OF THE HON'BLE SUB COURT, MUVATTUPUZHA.

PIUS C. KURIAKOSE,J.

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W.P.(C) No.3501 of 2005

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Dated: 13th August, 2007

JUDGMENT

In this Writ Petition under Article 227 of the Constitution the defendants impugn the order of mandatory injunction for restoring a kayyala and the judgment of the lower appellate court confirming that order.

2. Heard Mr.Anil S.Raj, learned counsel for the petitioners and Mr.R.Bindu Sasthamangalam, learned counsel for the respondents.

3. Mr.Anil S.Raj submits that relying solely on Ext.P3 Ex Parte Commissioner's report that the courts below have granted the order of mandatory injunction. Ext.P3 should not have been relied on without the Commissioner being examined in court and the petitioners being afforded an opportunity to test the correctness of what is reported under Ext.P3. According to the learned counsel, mandatory injunction is not to be granted as a matter of course. The suit is ripe for trial and therefore the learned counsel requested that the order of stay presently passed be continued and the court below be directed to expedite the trial. Mr.Anil S.Raj relied on various authorities including the judgment of the Division Bench of this court in **Maroli Achuthan v. Kunhipathumma** (AIR 1968 Kerala 28),

Metro Marins v. Bonus Watch Co.(P) Ltd.[(2004) 7 S.C.C. 478] and also the judgment in **Shepherd Homes Ltd. v. Sandham** [(1970) 3 All E.R. 402] in support of the propositions canvassed by him.

4. Per contra Mr.R.Bindu Sasthamangalam, learned counsel for the respondents placed strong reliance on the judgments of this court in **Krishnan v. Joseph Desouza** (1985 KLT 1010) and **Cheruvannoor Nallalam Grama Panchayat v. Ravi** (2006(1) KLT 546) in support of his argument that a party who violates orders passed by this court should not be allowed to take advantage of his wrongs. He submitted that having regard to the narrow contours of this court's supervisory jurisdiction under Article 227 of the Constitution, there is no warrant at all for interfering with the impugned orders.

5. I have no difficulty to agree with the learned counsel for the petitioners who submits that it may not be safe to place reliance on an ex parte commissioner's report especially when the reliefs sought for is in the nature of an ad interim mandatory injunction. But at the same time it should be noticed that the first inspection conducted by the Commissioner for preparing Ext.P3 report had to be made ex

parte on account of the obstruction by the petitioners themselves. The Commissioner has reported that as he was coming over to the suit schedule property for that inspection, he was obstructed by the defendants and certain others and the obstruction could be removed only with the police aid sought for by him. It was only after removal of the obstructors that the inspection could be conducted. Nothing prevented the petitioners from being present on the property during that inspection so that they could also point out to the Advocate Commissioner aspects which according to them are pertinent. Even without a second application both sides were permitted to submit work memos before the court and the same Commissioner was deputed to visit the property again so that a report will be submitted on the basis of the work memos submitted by both sides. I am of the view that if the petitioners were having serious objections regarding the credibility of the Advocate Commissioner, they would have opposed the same Commissioner being appointed for the purpose of the second visit. In that view of the matter, I am not prepared to say that Ext.P3 report is a value less ex parte report. Importantly in the 2nd report the Commissioner refers to Ext.P3 his earlier report and identifies the kayyala with reference to that also.

6. Concededly the order of temporary prohibitory injunction has attained finality. If it is not for entering into the property (which the petitioners cannot do in view of the subsistence of the prohibitory injunction order) the petitioners do not have to worry about the implementation of the mandatory injunction order. The cost for restoration of the kayyala, for which the mandatory injunction is now passed is only nominal, I am told.

7. Having gauged Exts. P5 and P6 by the parameters which are applicable to the exercise of the supervisory jurisdiction of this court under Article 227, I do not find any warrant for setting aside those orders. The challenge against Exts.P5 and P6 fail. The learned Munsiff is directed to special list the suit for trial in the earliest available special list and try the suit giving top priority so that the suit can be finally disposed of at the earliest and at any rate within three months of receiving copy of this judgment.

The Writ Petition is disposed of as above. No costs.

srd **PIUS C.KURIAKOSE, JUDGE**